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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

I. OHIO'S EXECUTIVE CLEMENCY PROCEDURE DOES NOT OFFEND DUE PROCESS.

A. Mr. Woodard does not seem to dispute Ohio's analytical framework for assessing his due process claim, just its application to the facts of this case. He first argues (Resp. Br. 13-18) that the seriousness of his sentence implicates a freestanding life interest that is protected by federal law and is therefore subject to the procedural safeguards of the due process clause. At one level, Mr. Woodard is correct. A capital sentence is different from other criminal sentences. But that difference merely explains why the Constitution in general and the due process clause in particular establish so many additional procedural safeguards before a death sentence (as opposed to another criminal sentence) may be imposed. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1 (1986). Once those extra protections have been provided and once an individual has received a capital sentence in accordance with them, the life interest protected by the clause has been procedurally safeguarded.

Nor does this approach render Mr. Woodard "legally dead." (Resp. Br. 13). It just establishes that with respect to the requirements of due process, the life interest Mr. Woodard had before killing Mani Akram has been given the process it is due. *See Herrera v. Collins*, 506 U.S. 390, 399-400 (1993). That does not make Mr. Woodard a stranger to our laws. He still may assert a host of other constitutional claims if the State makes the mistake of violating other constitutional guarantees. And he still may bring due process claims if the capital sentence is not meted out in a way contemplated at the time of sentence or if the State itself creates a new life or liberty interest and arbitrarily takes it away. Ohio, however, has not crossed these other constitutional lines.

Far from undermining this analysis, *Ford v. Wainwright*, 477 U.S. 399 (1986), actually supports it. The decision illustrates the kind of federal life interest that the Constitution protects even after an individual has received a properly-imposed capital sentence. At stake in *Ford* was whether a State could lawfully execute a person who became insane after trial. In holding that it could not, the Court prevented the State from imposing a punishment not reasonably contemplated at the time of conviction -- the execution of an incompetent individual. This is precisely the type of federal life or liberty interest that may arise after a criminal conviction and therefore require new procedural protections. *See Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (finding that inmate had a liberty interest in refusing the involuntary administration of psychotropic drugs). But since "an inmate has 'no constitutional or inherent right' to commutation of his sentence," *Connecticut Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (quoting *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979)), whether before or after conviction, clemency simply is not an equivalent life or liberty interest. *See Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2297, 2297 n.4 (1995) (the "Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed") (quotation omitted).

B. Mr. Woodard and his *amici* next argue (Resp. Br. 18-27) that clemency creates a protectible life or liberty interest because it "is an integral part of Ohio's criminal justice system," under *Evitts v. Lucey*, 469 U.S. 387 (1985). In making this argument, Mr. Woodard and his *amici* point to the historic availability of clemency in Ohio, its traditional role as a "final failsafe mechanism," its impact on the review of criminal sentences, its customary importance to the inmate and the fact that it has long been "a right conferred by the constitutional structure of the government." This approach asks the right

question; it just provides the wrong answer. While tradition no doubt informs this inquiry, it offers no refuge to Mr. Woodard. The relevant historical truth about clemency is not its availability but the discretion given the executive branch over this power and the utter lack of judicial oversight concerning its exercise. *See* Pet. Br. 2-5, 16-18, 22-25. That is why *Dumschat* accurately observed, and then relied upon the fact, that clemency decisions have "not traditionally been the business of the courts" and "are rarely, if ever, appropriate subjects for judicial review." 452 U.S. at 464.

This set of contentions also fails to come to grips with another flaw in Mr. Woodard's argument. Ohio, the 49 other States, the national government, and the political bodies that preceded them, all vested the clemency power in the executive branch for a reason: They wanted to insulate the clemency power from the other branches of government -- not to weaken the power, but to strengthen it. Once breached, however, the line separating the executive from the other branches over the exercise of clemency authority would become blurred, eventually allowing judicial review of decisions to *grant* clemency in the federal courts and if not there most assuredly in the State courts. Mr. Woodard never addresses these consequences of his argument, to say nothing of offering a solution to them.

C. Mr. Woodard and his *amici* further argue (Resp. 27-33) that such review is warranted because Ohio itself has created a protectible life or liberty interest. While conceding (Resp. Br. 29) that "the federal constitution [does] not require the states to provide clemency review in the first instance," he argues that Ohio's establishment of a clemency system meets these requirements and gives inmates "the right to meaningfully seek clemency."

This argument suffers from a number of defects. The prototypical due process problem the States face, and the one Mr. Woodard seems to be trying to implicate, stems from the States' creation of a mandatory procedure that they thereafter decline to follow. Here, to be sure, the Governor created a new clemency procedure, even one with some mandatory terms. But, importantly, he also decided to follow it. Indeed, we are here today precisely because the Governor adhered to the new (and, we respectfully believe, improved) procedure, not because he violated it or submitted to Mr. Woodard's request to alter it. A State, in short, does not customarily violate procedural due process by creating new procedures and then following them.

No less defective is Mr. Woodard's failure to acknowledge the nature of the indefinite interest that Ohio ultimately created with its new procedures. As in *Dumschat*, the clemency process at issue in no way diminishes the Governor's ultimate discretion to deny clemency applications. Under these circumstances, the Ohio procedure does not create a protectible life or liberty interest because such an interest in clemency cannot spring from what remains a "unilateral hope." *Dumschat*, 452 U.S. at 465. Put differently, it is difficult to impose an "atypical and significant hardship" on an inmate, *Sandin*, 515 U.S. 472, 115 S. Ct. at 2300, when the procedure at issue fails to diminish the Governor's ultimate discretion to deny a clemency application "for no reason at all." *Dumschat*, 452 U.S. at 467 (Brennan, J., concurring).

Nor may Mr. Woodard and his *amici* tenably counter these contentions by suggesting that *Dumschat* does not apply to capital sentences. The opinion of course contains no such limitation. And its discussion of liberty interests has equal application to life interests. "[T]he conviction, with all its procedural safeguards, has extinguished that liberty right: [Given] a valid conviction, the criminal defendant has been

constitutionally deprived of his liberty." 452 U.S. at 464 (quoting *Greenholtz*, 442 U.S. at 7). Notably, while there may be differences between life and liberty interests, they are accounted for long before a clemency application is made. The Court has required the States to set up a host of procedural safeguards precisely to ensure the legitimacy of a capital sentence. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231 (1988) (a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of the defendant compared to others found guilty of murder); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (state must establish rational criteria that narrow the decisionmaker's judgment as to whether the particular circumstances of defendant's case meet the threshold below which the penalty cannot be imposed); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (jury must be allowed to consider all of a capital defendant's mitigating evidence); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (plurality opinion) (jury must understand the critical role it plays in the sentencing decision); *Zant v. Stephens*, 462 U.S. 862 (1983) (a State's sentencing procedure must suitably direct and limit the decisionmaker's discretion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (same); *Beck v. Alabama*, 447 U.S. 625 (1980) (jury must be given the option of convicting the defendant of a lesser offense).

These protections, however, all apply at trial. They are designed to ensure the propriety of "the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment." *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion). The protections, notably, do not apply to the appellate stage of the proceeding, *see Pulley v. Harris*, 465 U.S. 37 (1984), or to collateral review, *see Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion). Still less

should they apply to executive clemency decisions, which (unlike direct appeal and collateral review) remain entirely discretionary.

II. VOLUNTARY CLEMENCY INTERVIEWS DO NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON AN INMATE'S PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Mr. Woodard initially responds (Resp. Br. 35-37) to Ohio's contention that his Fifth (and Fourteenth) Amendment rights were not violated by claiming there are insufficient facts to assess this argument. He suggests (Resp. Br. 36-37) that the issue "cannot be resolved without assessing the risk of incrimination" under the procedure and that "[t]he State has failed to prove that no set of facts under Ohio's Death Penalty Clemency Procedure could require that he risk self-incrimination." The record, however, *is* clear on this point. Nothing in the procedure grants clemency applicants immunity for what they might say or makes the interview in any way confidential. Ohio has permissibly chosen not to allow the inmate to say one thing in the interview and another in a habeas petition, and no amount of discovery will alter this feature of the procedure.

In claiming that Ohio must demonstrate that there are "no set of facts" under which he might risk self-incrimination, Mr. Woodard also has mischaracterized the relative burdens of the parties. While the overbreadth doctrine of the First Amendment allows free speech advocates to invalidate statutes by positing potentially unconstitutional applications of a law, *see, e.g., Perry v. Sinderman*, 408 U.S. 593 (1972), the Fifth Amendment does not. No precedent that we know of, and certainly none that Mr. Woodard has cited, allows individuals to hypothesize self-incrimination fact patterns in discovery,

compel the State to indicate how it would respond to each set of facts, then allow a court to rule on the validity of each response -- all before a single one of these possibilities has come to pass. As the Court has held in rejecting an unconstitutional conditions claim, the procedure "is not, on its face, an invalid practice, and there is no basis in the record for invalidating it as here applied to" Mr. Woodard. *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976).

Mr. Woodard also claims (Resp. Br. 41 & n.29) that the procedure fails to make clear that he may "refuse to answer questions" and thus may allow officials to "compel" answers from him. While all agree that Ohio cannot engage in this kind of coercion, whether in the clemency setting or elsewhere, this does not help Mr. Woodard. Should such egregious conduct occur in the future, Mr. Woodard may challenge the State then. But he cannot take down the entire clemency procedure on the presumption that the State will act unconstitutionally in the future. Indeed, even a procedure that said "no coercion allowed" could be breached, creating essentially the same risk that now exists with a procedure that is silent on the point. At any rate, because the law gives State and federal employees a very different presumption -- that they will obey their duty to follow the Constitution, not breach it, *see e.g., Fairbanks v. United States*, 118 U.S. 283, 285 (1901) -- this argument should be rejected.

B. In turning to the merits, Mr. Woodard seems to claim (Resp. Br. 38-39) that the Ohio procedure sets one constitutional right against another, as prohibited by *Simmons v. United States*, 390 U.S. 377 (1968). But how remains unclear. Unlike *Simmons* where the government forced the defendant to waive his Fifth Amendment right in order to establish standing to assert his Fourth Amendment right to suppress an illegal search, Mr. Woodard faces no such dilemma. Far from forcing him to choose between two

constitutional rights, Ohio has not even forced him to waive one. Only two possible rights could be infringed in this setting -- the right to counsel and the right to remain silent. Mr. Woodard nowhere appears to argue that he has a constitutional right to have counsel at the clemency interview. And he cannot establish that the procedure compels him to speak or even attend the interview -- because it does not. His participation is wholly voluntary.

Nor, contrary to Mr. Woodard's suggestion (Resp. Br. 39), must he "participate in the clemency interview" in order "to be heard." The procedure allows written submissions (with State-paid counsel available for guidance), which give him an initial voice in the decisionmaking process. *See* Ohio Death Penalty Clemency Procedure, VI(E)(1) (J.A. 12). He next suggests (Resp. Br. 39) that the State may use his silence, that is a decision not to be interviewed, against him in the clemency determination. This again poses an alleged problem that has not yet occurred and may never occur. It also remains unclear how to gauge the legal consequences of such an adverse inference. Since Ohio Governors ultimately remain free to grant or deny clemency with no regard to the amount of evidence arrayed for or against an applicant, they would seem to be entitled to draw whatever inference they wish from all aspects of the clemency application (for example, what is said or left unsaid in a written statement or the application itself), not just the interview. At all events, the Court has held that adverse inferences may be drawn from an individual's silence in a similar setting. For instance, in *Baxter v. Palmigiano*, the Court held that "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary hearing is not, on its face, an invalid practice." 425 U.S. at 320.

C. Equally unavailing is Mr. Woodard's attempt (Resp. Br. 39-46) to distinguish the cases on which the State has relied. In the criminal procedure context, as we have shown

(Pet. Br. 27-29), government may offer benefits on the condition that the recipient waive certain criminal procedure rights, and it may restrict individuals from insisting on speaking freely in one setting while demanding silence in another. Many of these cases, moreover, pose far more difficult choices for the individual than the one Mr. Woodard faces. Consider *McGautha v. California*, 402 U.S. 183 (1971), which upheld a State procedure that said a criminal defendant could exercise the right against self-incrimination on the issue of guilt only on the condition that he also surrender the right to testify on the issue of punishment; or *Wyman v. James*, 400 U.S. 309 (1971), which allowed the government to condition the receipt of welfare benefits on the recipient's submission to warrantless searches. Except to make the unexceptional point that the facts in these cases differ from those here, Mr. Woodard offers no meaningful explanation why these time-tested principles do not apply with equal force to the Ohio clemency procedure. Nor do the cases cited by Mr. Woodard advance his claims. They are all inapposite. *See Estelle v. Smith*, 451 U.S. 454 (1981) (finding that statements to a court-ordered psychiatrist could only be used at trial where the State advised defendant of *Miranda* rights and defendant freely waived them); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (discussing when interrogation occurs); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (finding privilege against self-incrimination is available to witnesses called in front of a grand jury); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (finding privilege against self-incrimination applies to civil proceedings); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (finding that a grand jury witness is not required to incriminate himself).

D. Perhaps most troubling of all, Mr. Woodard's argument attempts to take the concept of unconstitutional conditions in a direction it has never gone before. As the name suggests, the theory has always required a waiver of at least one constitutional right in return for some government benefit. But

here, as suggested above, Mr. Woodard has not even been able to show a single right that has been infringed. He has no constitutional right to counsel at clemency (even though Ohio has chosen to overprotect him by providing appointed counsel). He has no right to a clemency interview (even though Ohio has chosen to give him one). And he has no obligation to speak at, or even participate in, the interview. All Ohio has done is extend rights on a limited basis. It thus has not required a waiver of constitutional rights, but at most a waiver of extra-constitutional benefits.

Of course, if this novel theory is to take root, it ought to get equal play when it comes to other constitutional guarantees. Not just property rights would be covered by this expansive concept, *see Dolan v. City of Tigard*, 512 U.S. 374 (1994), so too would the structural guarantees of the Constitution. Whether it be the Tenth and Eleventh Amendments, or the foundational protections of liberty established by a system of "dual sovereignty" in which the federal government has just limited powers, *Printz v. United States*, __ U.S. __, 117 S.Ct. 2365 (1997), each of these guarantees would be eligible for unconstitutional-condition treatment. No plausible explanation exists for making Mr. Woodard's theory, or those theories promoted by renowned scholars, *see, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989), applicable to some, but not all, constitutional rights. Such views would potentially transform many of the Court's federalism decisions. They might, for example, undermine the result in cases like *South Dakota v. Dole*, 483 U.S. 203 (1987), which permitted the federal government to condition the States' receipt of federal highway funds on the waiver of their right to establish drinking ages below 21. *See also Oklahoma v. Civil Service Comm'n.*, 330 U.S. 127 (1947) (finding that the federal government could condition the States' receipt of federal highway funds on the waiver of the rights of members of the State Highway Commission to be engaged in

political activity).

In the final analysis, Mr. Woodard's theory of unconstitutional conditions is unprecedented, wrong and full of unanticipated consequences. Ohio has not breached any guarantee of the United States Constitution by adopting its clemency procedure, and no theory of unconstitutional conditions can -- or should -- change that fact. Perhaps recognizing the difficulties of Mr. Woodard's argument, not one of the three *amicus* briefs supporting him has offered a single argument on this score. His contention should be rejected as a matter of law.

CONCLUSION

For the foregoing reasons as well as those expressed in our opening brief, we respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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